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Tom Crowley, Jr.

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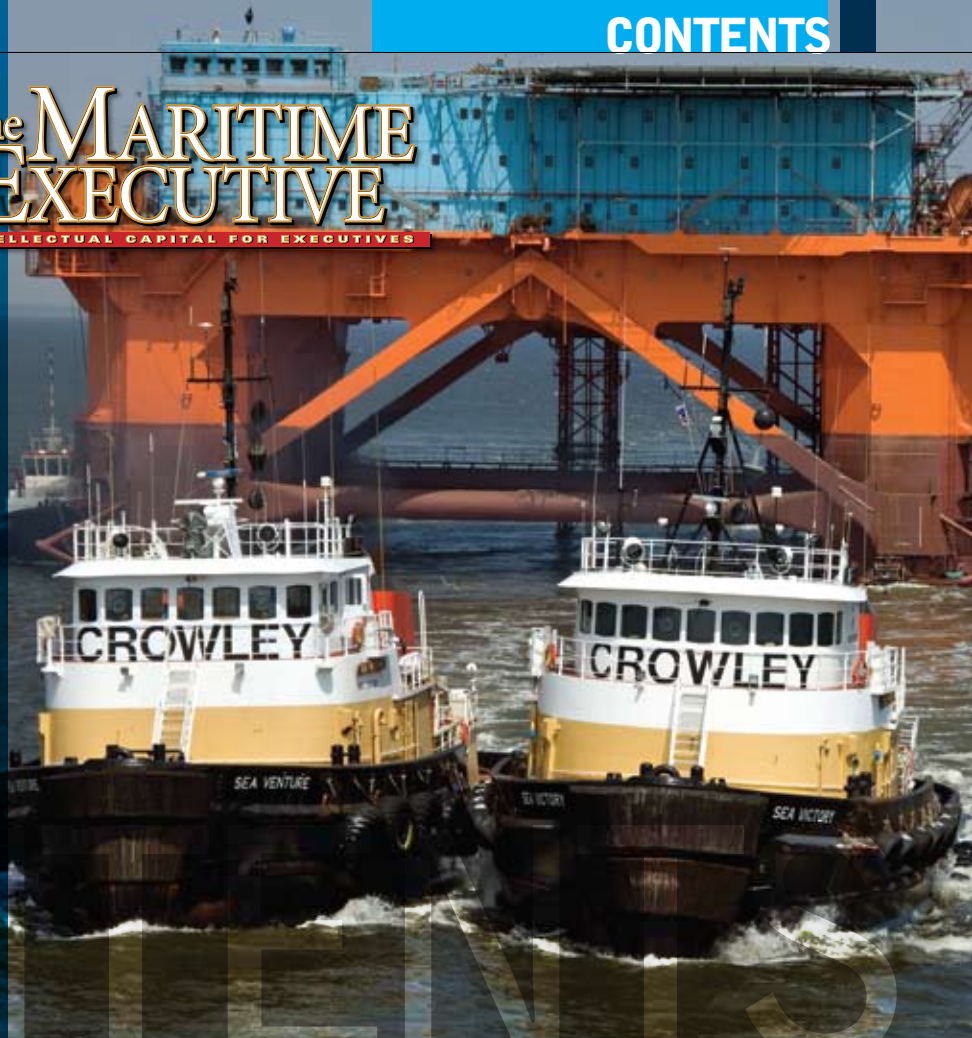
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Washington Insider

Economic Stimulus and EPA Regulation Provide Opportunities and Challenges for the Maritime Industry

A CONSENSUS FOR BOLD NATIONAL ECONOMIC STIMULUS EMERGES

WITH THE NOVEMBER ELECTIONS BEHIND US, the nation's attention is firmly fixed on action to stimulate America's economy. The loss of over two million American jobs in the last year means that domestic unemployment could reach double digits without swift and effective action. Conservative and progressive economists alike urged the new Obama Administration and 111th Congress to move swiftly to enact an enormous stimulus package. Unlike the years 1930 and 1931, when America's economy cratered amidst uncertainty about what to do and stubborn ideological opposition to government intervention, there was unanimous agreement this time around that strong government action is necessary. As President Obama's new chief economist, Lawrence Summers, wrote recently, "In this crisis, doing too little poses a greater risk than doing too much."

While there will no doubt be disagreement about the precise parameters of the stimulus, a remarkable consensus has emerged about its basic contours. Its principal purpose, at least initially, is job creation. Lacking that, it will be impossible

to turn around the housing market and consumer demand, two areas essential to a lasting recovery. Bold action is necessary to return people to work and restore public confidence so that consumers will resume spending.

Additionally, the new Administration's proposal, the American Recovery and Reinvestment Plan, promises to address America's backlog of neglected infrastructure projects. Despite several years of economic growth from 2002 – 2007 and massive deficit spending, critically important investments in America's future remain unfunded. Consequently, the Obama Administration and Congress promise to invest in public projects that will work for the American people. These include repairing and building our nation's schools, investing in information technology systems to improve the efficiency of our notoriously inefficient health care system, and rebuilding our roads, bridges, and public transit systems. The sad state of the nation's essential transportation systems is but the most obvious example of neglect. While what first comes to mind may be the congested state of our nation's crumbling high-

ways and bridges, those are but symptoms of the underlying problem, which is a neglected national transportation system. Presidential advisor David Axelrod emphasized the need for broader based action when he explained that "We want to do it in a way that leaves a lasting footprint, by investing... and rebuilding our crumbling roads, bridges and waterways."

Maritime Infrastructure Investment Opportunities

While the lion's share of transportation infrastructure investment will undoubtedly flow to highways and bridges, important maritime projects merit funding. These include investments in U.S. Coast Guard initiatives and our maritime transportation system.

The Coast Guard has particularly worthy infrastructure projects that are already approved and underway and can quickly use increased funding to employ many more workers. The badly needed modernization of its fleet has contracts in place across the nation that could easily be accelerated with additional funding. For example, the service is

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currently building new national security cutters and patrol boats. These programs should be accelerated immediately, putting more American shipyard workers back to work. Additionally, the service must accelerate repair and modernization of its critically important icebreaker fleet. Congress and the Bush Administration recently acknowledged the need and provided an initial \$30 million for long-overdue work on the icebreaker Polar Star. But this funding was plainly insufficient and should immediately be increased and the program accelerated and expanded to modernize the icebreaker fleet and build new icebreakers so that America has the capability to protect its national interests in the Arctic.

The nation's ports and waterways need increased investment as well. Sadly, many of these projects have long been in the works but have languished because of a lack of political will to apply the surplus funds available in the Harbor Maintenance Trust Fund. These funds should be released immediately and used to restore America's public resources rather than withheld to reduce the deficit. Current circumstances make it difficult to justify withholding a dredging surplus of over \$4 billion while waterway projects go unfunded and America's marine highways needlessly fill with silt.

Combining the new Administration's aim to invest in environmental protection with the need to spur the domestic automobile industry, Congress should provide funding to ports to promote the purchase of a new generation of environmentally efficient trucks for draying. Such a program, like that developed in California's ports of Los Angeles and Long Beach, would both stimulate the economy and improve air quality.

New EPA Regulation Challenges Vessel Operators

On December 19, 2008, the U.S. Environmental Protection Agency (EPA) issued the controversial Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (VGP), regulating vessel discharges under the Clean Water Act. The EPA regulation follows legislation enacted by Congress last summer exempting recreational and small commercial vessels from the impending regulation. The practical result is that the new regulation applies only to larger commercial vessels.

As a general matter, the Clean Water Act bars the discharge of pollutants into the waters of the United States unless authorized by a permit or expressly exempted. The new EPA regulation resulted

from protracted litigation by environmental groups, who challenged a longstanding EPA exemption carved out for discharges incidental to the operation of vessels. In March 2005 a federal district court struck down the EPA exemption, and EPA's appeal of the decision to the U.S. Court of Appeals for the Ninth Circuit failed. Ultimately, EPA did not appeal the decision to the Supreme Court, and the district court ordered vacatur of vessel exemption by December 19, 2008. While EPA met the deadline, the court also agreed to extend the exemption until February 6, 2009 at the request of representatives of the maritime industry and the EPA to facilitate compliance with the new rule.

The VGP includes new diverse regulatory requirements added by many states as "conditions" to their certification under the Clean Water Act. The resulting patchwork represents the balkanization of vessel discharge regulations long feared by the maritime industry. Oddly, while European nations have recently moved toward unification and harmonization of their maritime environmental regime, the United States drifts in the opposite direction. The net result is that vessel operations in the United States have become more complicated, burdensome, and expensive, and vessel operators and their

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crews face the threat of greater sanctions, including criminal prosecution. This result is particularly ironic considering the failure of federal and state governments to tackle the most serious sources of water pollution in the United States, agricultural runoff and municipal waste. Recent reports by the Washington Post detailing the complete failure of the EPA and the states to protect the Chesapeake Bay over more than two decades highlights the misplaced regulatory emphasis directed at vessels.

States and other jurisdictions that figure prominently in maritime commerce were deemed to have waived certification and therefore are covered by the new EPA rule by default. These include Texas, Louisiana, Washington, Oregon, Maryland, Virginia, Delaware, North Carolina, South Carolina, Alabama, Puerto Rico, the U.S. Virgin Islands, and American Samoa. Half the states, two tribes, and one territory, Guam, certified the EPA rule. Curiously, Alaska and Hawaii, both significant maritime states, failed to certify, but have indicated they will.

For those 28 states that certified the VGP, the additional conditions they promulgated in their certifications became part of the regulation applicable to discharges in their respective waters. The result is a patchwork of disparate rules.

Several states conditioned their certifications on additional graywater discharge restrictions. Georgia mandated use of marine sanitation devices. Maine restricted discharges of graywater and blackwater in its coastal waters and in "No Discharge Areas." Other states, such as Connecticut, Illinois, Michigan, Nebraska, New Hampshire, New Jersey, and New York, prohibited graywater and blackwater discharges.

New York and Massachusetts imposed near-shore ballast water exchange requirements, even though the EPA decided the exchanges were not justified on the Atlantic and Gulf Coasts. Ballast water standards approved by the International Maritime Organization (IMO) will become effective in 2016 and most Great Lakes states, including Ohio, Indiana, Illinois, Minnesota, Michigan and Pennsylvania, basically adopted the IMO ballast water standards and timetable. By contrast, New York required vessels that will enter New York waters to have stringent ballast water treatment systems by 2012.

California mandated new conditions requiring vessels to comply with the state's numeric effluent limits. Consequently, as of February 6, 2009, vessels calling in California must monitor waste streams

and not exceed those limits.

In the face of public comments regarding the jurisdictional reach of the new VGP requirements, the agency conceded that its rules only apply in the territorial waters of the United States and that the periodic inspection and reporting requirements should be "read in light of what they are – conditions prerequisite to discharge into waters of the U.S." This means that vessels entering U.S. waters must only conduct a weekly inspection during the week before coming into U.S. waters and will not be required to conduct weekly inspections at other times when the vessel is outside the United

States. Similarly, quarterly sampling would be required only during the quarter prior to entry, and an annual inspection would be required during the year prior to entry. Likewise, corrective actions must be taken by the later of the specified deadline or the vessel's return to the United States.

Vessel operators should complete comprehensive vessel discharge reviews incorporating the provisions of the VGP as soon as possible so that issues can be resolved and personnel trained prior to arrival in U.S. waters. And vessel operators must take into account the specific requirements of the states and other jurisdictions a vessel may visit.

Sadly, what has been missing from this strictly regulatory approach to reducing pollution from vessel discharges is a significant investment of public resources to help vessel operators minimize pollution and develop cost-effective ballast water treatment systems. The creative resources available in our nation's maritime academies have gone largely untapped in addressing these goals. Additionally, vessel operators should be given incentives to spur investment in improved systems to reduce pollution. And the new Administration and Congress should invest in research and development to produce and certify effective ballast water management systems and encourage vessel owners to install them swiftly.

Outlook

The New Year presents the maritime industry with both opportunities and challenges. The political imperative for economic stimulus provides remarkable opportunities for funding badly needed and long-overdue maritime projects. The political imperative for more demanding environmental regulation presents vessel operators and ports with unprecedented compliance challenges. Wise public policy should recognize the merits of harnessing these developments by providing funds that accomplish both.

MarEx



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